IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1924.

GEORGE HARRISON, Trustee of WESTERN ROPE AND MANUFACTURING COMPANY, Bankrupt, Petitioner, vs. ANNA B. CHAMBERLAIN, Respondent.	No.....

Certiorari to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF OF PETITIONER.

I.

The matter involved in this case is of very material importance to the administration of the Bankruptcy Act, and one upon which the courts of the United States, both district and circuit, are in hopeless conflict.

The point to be determined is, in the last analysis,

the meaning of the language in Muller v. Nugent, 184 U. S. 1, where this Court says:

> "But suppose that respondent had asserted that he had the right to possession by reason of a claim adverse to the bankrupt, the bankruptcy court had power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition (in bankruptcy)."

In the present case the Circuit Court has said that the bankruptcy court should examine only the claim, and if in law there is no adverseness shown, the summary jurisdiction attaches; but if in law there is adverseness, then, however fraudulent or fictitious the claim may be the summary jurisdiction is at an end.

Some of the circuits have so held, but others have taken the opposite view, and have held that the Court should examine the facts to see if the claim is made in good faith.

Indeed, it would appear that this division of opinion exists not only between the circuits, but between different benches in the Eighth Circuit.

At the time this present case was argued before Stone and Lewis, Circuit Judges, and Phillips, District Judge, another case was argued before Kenyon, Circuit Judge, and Trieber and Munger, District Judges (In re Uttenbogard, 295 Fed. 778).

In the latter case the Eighth Circuit, through Judge Treiber, said (page 781):

> "If there is any liability of the commission merchant, upon such a state of facts, he claiming in good faith to hold these sums adversely, he is beyond question subject to a plenary suit in a court of competent jurisdiction.
>
> "The District Court should have first passed on the jurisdiction of the referee to proceed summarily in order to determine whether there is reasonable ground to sustain the bank's claim that it is entitled to retain the money in controversy and that the adverse claim is made in good faith."

In the present case the District Court appointed the Referee its Special Master to examine the record to see if the claim was made in good faith; if in fact there was reasonable ground to sustain the claim of Anna B. Chamberlain. And the Referee determined that the claim was not made in good faith, but was made in flagrant fraud, and therefore there was no basis for the claim.

In many of the Circuit Courts of Appeal, and apparently, at least, in one bench of the Eighth Circuit, the question of the good faith of the claimant appears to be a test of jurisdiction. How is the good faith to be determined? From the facts or from a paper claim, which may, as in this case, contradict the facts

as shown on the record. If the Court may not examine the facts, then in all seriousness it is submitted that the only cases in which the summary jurisdiction could be sustained would be where, if there were bad faith, the claimant had no attorney and lacked common intelligence; or, if he had intelligence, he had sufficient good faith to show his bad faith. This is not said in a spirit of levity nor to turn a paradox, but because it seems the only way to state such a rule.

In the Ninth Circuit the precise question was passed upon in

In re Eilers Music House, 270 Fed. 915,

where the Circuit Court of Appeals adopted a Master's report, which said:

> "Before there is an ouster (of the summary jurisdiction) the claim must have such foundation in law and in fact as to make it appear that it exists, can be maintained, and is asserted in good faith."

In

Levinson v. Greene, 296 Fed. 598,

the Circuit Court of Appeals for the Ninth Circuit held:

> "The power that may be exercised (the summary jurisdiction) by the ancillary court to take

> possession of property rests on the interest in the property of the person or estate in whose right the proceeding is carried on, and it follows that what this interest may be cannot be ascertained without determining conflicting interests that may be claimed by others in the property."

It is believed that the decisions above cannot be reconciled with the opinion of the Court in the present case that:

> "In our judgment the meaning of that word (colorable) as used in that connection is that a claim alleged to be adverse is only colorably so when, admitting the facts to be as alleged by the claimant, there is, as a matter of law, no adverseness in the claim."

And

> "However improbable or even fraudulent this claim may be, yet that matter has no bearing upon determination of jurisdiction, but is pertinent only on the merits in the court properly having jurisdiction of the controversy."

Until the recent decision of this Court by Mr. Justice Brandeis, in Taubel Scott Kitzmiller Co. v. Fox, No. 188, October Term, 1923, it was the opinion of some of the circuits, especially the Eighth, that actual possession was necessary to the summary jurisdiction. In fact, in In re Rathman, 183 Fed. 913, Judge

Sanborn said that possession was the touchstone of summary jurisdiction.

But, under the rule in the Taubel case, the summary jurisdiction attaches to property in the constructive as well as in the actual possession of the trustee, and as the Court said in that case, the bankruptcy court has jurisdiction to determine if it has constructive possession.

How may this be determined?

In some of the circuits, if the claim is found to be made in bad faith and founded in fraud, it is colorable within the meaning of the law. In this case the rule is announced that it is colorable only if the claimant admits it to be so, but if any allegations are made by the claimant, which, if uncontradicted, would support the claim as a matter of law, the summary jurisdiction is at an end. "However," in the language of the Court in its opinion in this case, "improbable or even fraudulent this claim may be."

In the present case the lower court found every fact necessary to sustain the summary jurisdiction:

> That the fund was an asset of the bankrupt estate.
>
> That the title had never passed from the bankrupt.
>
> That the claim set up was colorable and fraudulent and not real.
>
> That the fund was held for the bankrupt.

This case presents squarely for determination the question:

> Is the summary jurisdiction of the bankruptcy court to be determined by the facts as found by the Court, or solely by the admissions of the claimant?

The Circuit Court of Appeals does not disturb the findings as made by the District Court; so, for the purpose of this petition, those findings stand.

The decision turns upon the fact that there was testimony "that a Mrs. Gessel, who was a stockholder in a corporation which was the immediate predecessor of the bankrupt, was given money from the assets of that company, with the permission of the only other stockholder with herself in that company, at a time when such company was entirely solvent; the sums taken might have been declared as dividends; that this money was given to her mother in payment of indebtedness due petitioner from Mrs. Gessel." The Court then says: "However improbable or even fraudulent this claim may be, yet that matter has no bearing upon determination of jurisdiction * * *."

The Master found, and the record shows, not that the money was paid to Anna B. Chamberlain for indebtedness, but was deposited in a bank to the joint

account of Anna B. Chamberlain and Agnes Leftwich; that immediately a farm was bought with it in the name of Anna B. Chamberlain, and she immediately conveyed that farm to Agnes Leftwich.

Under the circumstances, the title to the money never having passed to Agnes Leftwich, certainly her mother could not assert title.

This Court has held in Stellwegon v. Clum, 254 U. S. 605, that a trustee in bankruptcy, in collecting the assets of a bankrupt, is given the benefit of the state law as to ownership, though this may lead to different results in the various states.

The Bankruptcy Act of 1908, as amended, expressly gives to the trustee the status of a judgment creditor (Amendment 1910, Sec. 47A [2]).

See Remington (3d. Ed.), Sec. 1507.

The law in Oklahoma is that a diversion of funds by an officer of a corporation, without a corporate act, does not pass the title of the fund so diverted from the corporation, and that a judgment creditor may levy an execution upon such property when found in the hands of a third person, whether such creditor was so at the time of the diversion of the fund or became so subsequently. This question is fully discussed by the Supreme Court of Oklahoma in Indian Land and Trust Company against Robert L. Owen,

63 Okla. 127. Even in the absence of fraud, the giving by one officer to another an asset of a corporation does not pass title. Of course, if the specific asset were not located and a general suit for accounting were necessary, this could not be the subject of the summary jurisdiction. There is no controversy about the fact that the $10,000.00 in currency in the possession of the respondent is this same asset.

If this is the property of the corporation, a judgment creditor in Oklahoma could levy an execution on it in the hands of the respondent.

The trustee is, by the express provisions of the Bankruptcy Act, vested with the title of all property of the bankrupt upon which a judgment creditor might levy an execution. (See 70a [5]; In re Gracewith, 115 Fed. 87 [C. C. A., 4th Circuit].)

So, without going into the question of embezzlement or fraud as an element of jurisdiction, and admitting for the purpose of this statement that one officer of the corporation took a specific fund from the corporate treasury without corporate authority and delivered it to another officer, under the law in Oklahoma the title never passed, and if the specific fund can be located a judgment creditor of a corporation may levy an execution upon that fund. And a trustee in bankruptcy, having the status of a judgment creditor, may recover it in a summary proceeding,

for the basis of the right is that it is a specifically located asset, title to which is in the bankrupt.

It may be that the apparent conflict between the circuits can be reconciled by the statement of the rule thus:

If the bankruptcy court finds from the record a state of facts which, in a plenary suit, would justify an instructed verdict or an instruction to a jury that the claim was fraudulent and fictitious, then the summary jurisdiction attaches. In this case the Court has so found.

To sustain the doctrine that a trustee must proceed by a plenary suit, after establishing in the bankruptcy hearing that a claim is fraudulent and fictitious, it is necessary to lay down the rule that a court would not set aside a verdict of a jury which was clearly founded upon a fraudulent and fictitious claim. If, upon a given state of facts, the Court would set aside a verdict against the trustee, then it should direct a verdict in his favor. And if, upon the facts as found, the Court in a plenary suit should direct a verdict, it seems reasonable that the summary jurisdiction is properly invoked.

We cannot conceive that in the administration of the bankruptcy law the trustee, having established that the claim of one adversely asserting a right is

patently and flagrantly fraudulent, colorable and fictitious, should be deprived of the summary remedy which the Bankruptcy Act has provided.

It is respectfully submitted that the questions herein presented are of sufficient importance to warrant a review and determination by this Honorable Court.

Respectfully submitted,

PHILIP KATES,
SAMUEL A. MITCHELL,
Counsel for Petitioners.

FILED
NOV 21 1925
WM. R. STANSBURY
CLERK

No. 168.

In the Supreme Court of the United States.

October Term, 1925

GEORGE HARRISON, TRUSTEE IN BANKRUPTCY, OF WESTERN ROPE MANUFACTURING COMPANY, INCORPORATED, BANKRUPT, PETITIONER,

VERSUS

ANNA B. CHAMBERLAIN, RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* PETITIONER.

PHILIP KATES,
ATTORNEY FOR PETITIONER.
S. A. Mitchell

INDEX.

PAGE

Abstract of Section 2, Bankruptcy Act of 1898..... 1

Statement of the Case..... 2

Specifications of Error..... 5

Argument..... 6

I. The findings of the Referee having been confirmed by the District Court conclude the facts..... 6

II. The Bankruptcy Court has jurisdiction to determine from the facts if a claim of title is colorable and fictitious..... 8

III. The appeal should have been dismissed..... 29

IV. Admitting the facts to be as claimed by respondent, the order of the District Court should have been affirmed..... 30

V. The respondent has been heard as in a plenary suit..... 32

Authorities Cited.

Bankruptcy Act, 1908.....31

Bankruptcy Act, 1908, Sec. 2..... 1

Bankruptcy Act, 1898, Am. 1910, Sec. 47-A (2)..... 31

Bankruptcy Act, 1898, Sec. 70-A (5)..... 32

Brandenburg (4th ed), Sec. 853.....11

Central Nat'l Bk., etc., vs. Life Ins. Co., 104 U. S. 54..10, 11

Corpus Juris, vol. 7, p. 118.....11

Free vs. Shapiro, 5 Fed. (2) 578.....30

Gray vs. Gudger, 260 Fed. 931.....18

Hammond vs. Whittridge, 204 U. S. 538.....12

Head vs. Brainard, 7 Fed. (2) 289.....15, 16

AUTHORITIES—Continued.

PAGE

Indian Land & Trust Co. vs. Owen, 63 Okl. 127.....10, 31
In re Eilers Music House, 270 Fed. 915.....20, 33
In re Ellis Bros. Printing Co., 156 Fed. 430.....18
In re Franklin Suit Co., 197 Fed. 591.....20
In re Friedman, 161 Fed. 260.....19
In re Garcewich, 115 Fed. 87.....31
In re Holbrook Shoe & L. Co., 165 Fed. 973.....19
In re Ironclad Mfg. Co., 194 Fed. 906.....20
In re Logan, 196 Fed. 678.....22, 23, 24
In re Looschen Piano Co., 261 Fed. 93.....17
In re Norris, 177 Fed. 598.....19
In re Resnek Shapiro & Co., 246 Fed. 879.....20
In re Rathman, 183 Fed. 913.....14
In re Rockford Prod. & Sales Co., 275 Fed. 811.....18
In re Uttenbogard, 295 Fed. 778.....12, 21
Kaigler vs. Gibson, 264 Fed. 240.....18
Levinson vs. Green, 296 Fed. 598 (5, 2d, 75).....19
May vs. Henderson, No. 126, October term, 1924.....14, 15
Mueller vs. Nugent, 184 U. S. 1.....5, 13, 15
Nichols vs. Elkens, 225 Fed. 689.....6
Orinoco Iron Co. vs. Metzel, 230 Fed. 40.....29
Remington, 3d ed., Secs. 3765-3766.....29
Remington, 3d ed., Sec. 3639.....6
Remington, 3d ed., Sec. 1507. 30
Stellwagon vs. Clum, 245 U. S. 605. 30
Taubel vs. Scott, 264 U. S. 426.....14, 15
U. S. Fidelity & Guaranty Co. vs. Bray, 225 U. S. 205...13
Ury vs. Van Every, 188 Pac. 985.....11
Wooten vs. Owenby, 265 Fed. 91.....6

IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1925

No. 168

GEORGE HARRISON, TRUSTEE IN BANKRUPTCY, OF WESTERN ROPE MANUFACTURING COMPANY, INCORPORATED, BANKRUPT, PETITIONER,

versus

ANNA B. CHAMBERLAIN, RESPONDENT.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF *of* PETITIONER.

The opinion below is not reported. It is found on page 225 of the Record.

The jurisdiction of the bankruptcy court arises under section 2, Bankruptcy Act of 1898.

"Courts of Bankruptcy * * * are hereby invested * * * with such jurisdiction as will enable them to * * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary to the complete determination of a matter in controversy; (7)

cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto except as herein otherwise provided. * * * nothing in this section shall be construed to deprive a court of bankruptcy of any power it would possess were certain powers not here enumerated."

The question involved is:

May a court of bankruptcy, in a summary proceeding, find from the evidence in the bankruptcy case that the assertion of title by a person in possession of property claimed by the trustee, is colorable and fraudulent, and order its restoration to the trustee; or is the summary jurisdiction to be denied unless such assertion on its face is without foundation in law?

Statement of the Case.

The Western Rope and Manufacturing Company, a corporation, was adjudicated a bankrupt by the United States District Court for the Eastern District of Oklahoma, sitting in bankruptcy, on May 25, 1921 (R. 1); and on August 31, 1921, Anna B. Chamberlain, the respondent, and Agnes Gessel (sometimes herein called Agnes Leftwich), her daughter, were made parties to the bankruptcy proceedings, as holding certain assets of the bankrupt, and necessary to the complete determination of a matter in controversy (R. 3). Agnes Gessel had been an officer and director of the company during all the time involved in these proceedings (R. 17). B. F. Gessel owned all the stock except one share, which was held by Agnes Gessel (R. 14).

On September 14, 1921, an examination of these parties was begun, and held from time to time until October 23,

1921. Among other things, it was disclosed that in 1917, fraudulently and secretly, Agnes Gessel had, with a check of the Western Rope and Cordage Company (found by the District Court to have been the same as the bankrupt, a reorganization having taken place), payable to the Central National Bank of Tulsa, purchased a cashier's check of that bank for $9,500.00, payable to her mother, Anna B. Chamberlain, the respondent. This money was deposited to the joint account of Agnes Leftwich and Anna B. Chamberlain in the First National Bank at Broken Arrow, Oklahoma, and a farm was purchased with this money on October 2nd, 1917, the title being taken in the name of Anna B. Chamberlain; but two weeks later, on October 16th, 1917, the title was transferred by respondent to her daughter, Agnes Leftwich (R. 13, Master's report).

On March 13th, 1920, Agnes Leftwich (her mother, the respondent, joining in the deed), conveyed the farm to one G. F. Hanks, and the proceeds of that sale, converted into currency, are admitted to be in the possession of the respondent and is the fund that the trustee seeks to recover in this proceeding (R. 13, Master's report).

The trustee filed a petition in the bankruptcy case on November 12th, 1921, for an order directing the respondent to deliver the money to him (R. 6), for the reason that her claim was fictitious and colorable. The matter was referred to the referee in bankruptcy, as a special master, to examine the bankruptcy record and report to the court his findings of fact and conclusions of law (R. 12). The order of reference was subsequently enlarged, to permit the introduction of other testimony (R. 13).

A response was filed (R. 9) and a reply to the response (R. 11), and additional testimony taken.

The master found the facts as above stated, and also found that the claim of Anna B. Chamberlain is not real, but is only a colorable claim, based on fraud; that the title to the fund has never passed from the bankrupt, and that it is an asset of the estate, in the possession of respondent, which should be turned over to the trustee (R. 13).

The District Court found the facts as reported by the master and ordered the money delivered to the trustee (R. 213).

The respondent then prosecuted to the Circuit Court of Appeals for the Eighth Circuit, an appeal and a petition to review. The petition to review was dismissed, but the appeal was allowed (R. 225), and the District Court directed to set aside its order (R. 226).

The opinion of the Circuit Court of Appeals appears in the record at page 225.

The petition for a rehearing was filed (R. 226) and denied on July 9th, 1924 (R. 232).

A petition for *certiorari* was filed in this court in due time and was allowed October 27, 1924.

SPECIFICATIONS *of* ERROR.

The Circuit Court of Appeals erred:

1. In considering and allowing the appeal.

As the jurisdiction of the District Court was involved, the only method of review was by petition to revise.

2. In its definition of the word "colorable" (as used in Mueller vs. Nugent, 184 U. S. 1), when it said:

> "In our judgment the meaning of that word when used in this connection, that a claim alleged to be adverse is only colorably so when admitting the facts as alleged by the plaintiffs, there is as a matter of law no adverseness in the claim."

3. In limiting the summary jurisdiction of the bankruptcy court to cases in which a claim set up by one holding an asset of the bankrupt is without merit only upon the face of the claim.

4. In denying the jurisdiction of the bankruptcy court to proceed summarily, where the claim of title set up by one holding property of the bankrupt is improbable or fraudulent.

5. In directing the District Court to set aside its order requiring the respondent to return to the trustee the asset involved in this proceeding.

6. In refusing to affirm the order of the District Court.

ARGUMENT.

I.

The findings of the referee having been confirmed by the District Court conclude the facts.

The referee found that this is an asset of the bankrupt, held by the respondent only by a fraudulent and colorable claim of title (R. 13). These findings have been approved by the District Court, and have not and should not be disturbed.

Wooten vs. Ownbey, 265 Fed. 91 (97) (8th C. C. A.):

> "While the view of this court might be in favor of a different conclusion from the testimony of Ownbey, the case is one where master and trial court have concurred in a finding of fact upon conflicting evidence, and that finding should be confirmed by this court."

Nichols vs. Elkens, 225 Fed. 689 (692) (8th C. C. A.):

> "The rule is firmly established by the Supreme Court and has been repeatedly applied by this court that when the chancellor has considered conflicting evidence, made his findings and a decree thereon, they will be held by appellate courts to be presumably correct, and unless an obvious error had intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence, the findings must stand."

Remington, 3rd ed., 3639:

> "Upon review, the referee's order is to have the presumption in its favor, also his findings of fact are to have the same presumption."

In this case the findings of fact are expressly approved by the District Court and were not disturbed by the Circuit Court of Appeals, the case being decided solely upon jurisdictional grounds.

This court will not look beyond the findings of the master, that the claim of title is colorable, fictitious and fraudulent. But, an examination of the record at every point shows that no other findings could be made. The audit of the books made by Mr. Craig, as shown by his testimony (R. 55-77, and 156-165), taken in connection with the testimony of Agnes Gessel and respondent, and B. M. Gessel discloses that the respondent and her daughter secured from the funds of the bankrupt an enormous sum of money from 1917 up to the time of bankruptcy, and that it was the taking of this money which rendered the company insolvent. The method of operation was this: The bankrupt was doing business with the banks of Tulsa, borrowing money and taking up drafts for machinery and supplies. Therefore, any payment to a bank would excite no suspicion on the part of Mr. Gessel. The entire bookkeeping of the company and the management of the accounts were in charge of Agnes Leftwich, the daughter of the respondent (R. 169). Mr. Gessel spent most of his time in the field, selling supplies, and only saw from time to time a statement prepared by Agnes Leftwich, showing the sums received and paid out (R. 42).

These checks by which the respondent and her daughter Agnes Gessel secured the money were payable to some bank with which the company was doing business.

When a statement was laid upon the desk of Mr. Gessel, it merely showed checks drawn to various banks, as the company was at all times taking up drafts,

he paid no attention to the amounts, because, as he testified, he considered they were simply checks to take up machinery and supplies, which were shipped with bill of lading attached. The company was making an enormous amount of money and he had absolute confidence in Agnes Leftwich, and he at no time checked over the books. But instead of being used for the purpose of taking up notes and drafts at the bank, the money went into the hands of the respondent and her daughter Agnes Gessel (R. 156-159; 42, 43, 44).

But without the knowledge of B. M. Gessel, Agnes Leftwich would charge these amounts into B. M. Gessel's personal account (R. 44). After the bankruptcy, when the books were audited, these withdrawals appeared and a large amount has been directly traced to the respondent and Agnes Gessel. The sum of $510,066.53 was charged into B. M. Gessel's account (R. 59).

The bankruptcy court had before it the witnesses and upon the testimony could have made no other findings than it did.

II.

The bankruptcy court had jurisdiction to determine the facts.

In the report of the special master is this finding:

> "The respondent has entered special appearance at all the hearings had herein, and has demurred on the ground that the bankruptcy court has no jurisdiction to make her a party and proceed summarily, but has answered fully to the petition, examined the witnesses introduced by the trustee, and moved for a con-

tinuance of the hearing until she could have order of reference enlarged to hear everything on behalf of defendant." (R. 13.)

After the case had been referred by Judge WILLIAMS to the special master to report on the bankruptcy record, the following order was entered by Judge DYER, sitting in the Eastern District of Oklahoma, for Judge WILLIAMS (R. 13):

> "Now on this 20th day of February, 1922, it being made to appear to the court that the order of reference heretofore made in said cause referring to the referee in bankruptcy the petition of the trustee, George Harrison, for a summary order against Anna B. Chamberlain to pay into court $10,000.00, is too limited in its scope;
>
> "It is therefore ordered that the said matter be and is hereby referred to the Honorable A. F. McGarr, referee in bankruptcy, to take the evidence that may be offered for and against said petitioner and to report to the court his findings of fact and conclusions of law thereon.
>
> "DAVID P. DYER, *Judge.*"

The entire question of the effect of the plea to the jurisdiction of the District Court, either to make the respondent a party to the bankruptcy proceedings or to entertain the application for a summary order for the return of $10,000.00 in currency, held by the respondent, is therefore disposed of by the action of the respondent, in securing an enlargement of the order of reference to permit her to introduce testimony in addition to that contained in the bankruptcy record.

This is a proceeding under section 25, Act, 1898, to reduce to possession a specific, definitely traced asset, the title

to which never passed from the bankrupt, and is not, in any sense, a controversy with an adverse claimant to set aside a transfer, or to revest a title which has passed into a third person.

Agnes Leftwich, in the first instance, wrongfully took this money from the bankrupt. By her act no title could vest in her. The corporation did not transfer it to her. As will be shown hereafter, under the law in Oklahoma, the act of an officer in diverting funds cannot vest the title in her or her grantee.

—Indian Land & Trust Co. vs. Owen, 63 Okl. 127.

And under the decision of this court in Stellwagon vs. Clum, 254 U. S. 605, the rights of a trustee in bankruptcy are determined by state laws, even though to that extent the bankruptcy administration may not be uniform throughout the several states.

And where the path is clear and certain, and the diverted asset is traced without question, there is no reason to compel a trustee in bankruptcy to resort to a proceeding in some other tribunal than the bankruptcy court itself for the restoration of the asset.

The officers of a corporation are trustees of its funds for the benefit of its creditors, its stockholders or a trustee in bankruptcy. If a specific asset is traced into the hands of an officer and then traced into the hands of a person who is not a bona fide holder, it would seem that she should be compelled to deliver back the property which she wrongfully holds.

This court, in the case of Central National Bank of Baltimore vs. Connecticut Mutual Life Insurance Company,

104 U. S. 54, reviews the English and American cases upon the law of trust. In that case, Mr. Justice MATHEWS adopted this language:

> "So long as the trust property can be traced and followed into other property in which it has been converted, that remains subject to the trust."

In Ury vs. Van Every, 188 Pac. 985, the Supreme Court of California, in passing upon a demurrer to a petition by the trustee in bankruptcy to recover certain property, quoted from 7 Corpus Juris, 118, as follows:

> "Where one for whom property is held in trust becomes bankrupt, his entire interest in the trust estate passes to the trustee in bankruptcy, and such ownership draws with it the right of possession, in so far as such interest is capable of possession."

And also quotes from Brandenburg on Bankruptcy, (4th ed.) 853:

> "Any property, in which there is a secret trust for the bankrupt's benefit, no matter how much covered up, passes to the trustee."

In support of the text, Corpus Juris cites Hammond vs. Whitredge, 204 U. S. 538, in which this court passed upon a decision of the Supreme Judicial Court of Massachusetts, to the effect that an interest of a *cestui que* trust passes to his assignees in bankruptcy. The Massachusetts court said:

> "By virtue of the assignment in bankruptcy, the complete ownership in this incorporeal interest in this personal property became vested in the assignees, and the ownership drew after it possession so far as the interest here in question (an incorporeal interest, because an interest in remainder) is capable of possession."

The trustee in bankruptcy, in the present case, upon his appointment and qualification, became vested with the possession, at least constructively, of this asset. Whether it was in the form in which it was first taken, or in the form of real estate, or in the form of a mortgage, or in the form of currency, is of no consequence. For this particular asset has been traced into the possession of the respondent; as to that fact there is no question. The sole question in the case is, in the language of the Circuit Court of Appeals for the Eighth Circuit, in *In re* Uttenbogard, 295 Fed. 778 (781):

> "Whether there is reasonable ground to sustain the respondent's claim that she is entitled to retain the money in controversy and that the adverse claim is made in good faith."

The master found that the claim had no existence in fact; the District Court approved this finding; the Circuit Court of Appeals did not disturb the findings. But that court decided that there was no jurisdiction in the bankruptcy court to proceed summarily, because the allegation of the claimant, if not contradicted, would support a claim in law.

In passing upon the question of the good faith of the respondent in asserting this claim, the lower court had before it the entire bankruptcy record, and in addition the testimony offered by the respondent under her enlarged order of reference. Her claim of title is based upon allegations which are contradicted at every point by the facts as found. She says that her daughter owed her money and that this was in payment of the debt (R. 10). The court found that it was secretly and fraudulently withdrawn and deposited to the joint account of herself and daughter (R. 13). She says

that this fund was mingled with her own and that she cannot distinguish it (R. 11). The court found that this particular money was used to purchase a farm, the title to which immediately after its purchase was transferred to Agnes Leftwich, and that it stayed in the name of Agnes Leftwich until it was sold, shortly before the bankruptcy (R. 13).

Upon those findings, it is submitted that to require the trustee to leave the bankruptcy court; to file a general suit in some other tribunal, and to litigate a question already fully heard and determined, would be subversive of the entire purpose of the bankruptcy act. Where the title to property has never passed from the bankrupt, the restoration of possession is a part of the administration of the estate, and

> "Creditors are entitled to have this authority exercised, and may justly complain when an important part of the administration is sought to be effected by a slower and less appropriate process of a plenary suit in equity in another court."
>
> —U. S. Fidelity & Guar. Co. vs. Bray, 225 U. S. 205.

Under the bankruptcy act and under the decisions of this court, the exercise of the summary jurisdiction is not a matter of discretion for the bankruptcy court. It is, as this court states in Miller vs. Nugent, 184 U. S. 1,

> "A matter of duty,"

and it is a duty which this court has said in U. S. Fidelity & Guaranty Co. vs. Bray, 225 U. S. 205,

> "cannot be surrendered."

In Mueller vs. Nugent, 184 U. S. 1, this court said:

> "But suppose that respondent had asserted that she had the right of possession by reason of a claim

adverse to the bankrupt, the bankruptcy court has the power to ascertain whether any basis for such a claim actually existed at the time of filing the petition."

From that statement of the law, there have grown up three lines of decisions, which may be grouped as follows:

First. The view that actual possession by a trustee in bankruptcy is essential to the exercise of summary jurisdiction to determine title. In support of this line of decisions is cited the opinion of Judge SANBORN, *In re* Rathman, 183 Fed. 913 (8th C. C. A.), in which he said that possession was the "touchstone" of the summary jurisdiction. The Rathman case has been cited by courts and by text books as supporting the doctrine that actual possession by a trustee is necessary in all cases. But, in the Rathman case, the denial of the summary jurisdiction was based upon the finding that the claim of the holder of the property was neither frivolous nor colorable, but substantial and made in good faith.

But the necessity of actual possession has been denied by this court in the case of Taubel vs. Fox, 264 U. S. 426, and in the recent case of May vs. Henderson, No. 126, October term, 1924.

Second. The view that the summary jurisdiction may be exercised upon the filing of a petition by the trustee alleging that a third person holds property for the bankrupt, even though the trustee has not possession of the property; but that this summary jurisdiction is ended if the respondent presents a claim to ownership of the property, which would be good against a demurrer.

This doctrine is announced by Judge STONE (R. 225) thus: That no matter how fictitious or improbable the

claim of the respondent may be, if she sets up any facts, which, if uncontradicted, might show a title in her, then the jurisdiction of the bankruptcy court is ended.

Third. The view that where a trustee asserts ownership of a specific asset and the title is claimed by a third person in actual possession, the bankruptcy court has the right and is charged with the duty of making an investigation to determine whether the claim of the third person is made in good faith and could probably be sustained. If the bankruptcy court determines that the claim is not made in good faith, is fraudulent and colorable, then it has the constructive possession and should order the asset delivered to the trustee. This doctrine we believe to be sound and to be the doctrine laid down by this court in

Mueller vs. Nugent, 184 U. S. 1;
Taubel, etc., vs. Fox, 264 U. S. 426;
May vs. Henderson, 126, October Term 1924.

The most recent case upon this subject is that of Head vs. Brainard, 5 Fed. (2), 289, in which a rehearing was denied by the Ninth Circuit Court of Appeals on May 25, 1925. In that case certain property was held in the possession of Head and others claiming title. The issue was whether or not defendants were holding under a pretense of color of title and in bad faith. The respondents asserted that they held the property adversely under claim of title. The court referred the matter to a special master to take testimony to determine whether or not they were holding in good faith or under colorable title. The master found that Head and others held in bad faith, under mere pretense, and that title was in the bankrupt.

In passing upon this question, the Circuit Court of Appeals said:

> "In our opinion the court by its order of confirmation of the master's report in the ancillary bankruptcy proceedings adjudged that the bankrupt estate had title to the property in question, and that the claimants thereto, who were these plaintiffs in error, did not hold the property by right or assertion of right made in good faith. There was a challenge by the respondent in the ancillary proceedings to the jurisdiction, but that step did not oust the court of jurisdiction, or do more than to impose upon it the duty to cite claimants to show cause why they should not yield possession of the property to the trustee, and to inquire whether the claim of title was genuine and adverse and made in good faith. Cohen vs. Hessel, (C. C. A.) 278 Fed. 929. Repeated decisions have recognized the obvious proposition that before jurisdiction of the District Court can be ousted by mere assertion of title by a claimant, there must be a hearing and a decision whether the claim interposed is in good faith and real, or is without actual merit or legal foundation. If the decision is the one way, the bankruptcy court should decline to try the issue summarily, but if it be decided that the claim is wholly without merit and not filed in good faith, then the court has power to make an order requiring the wrongful holder to surrender to the trustee and to direct administration. *In re* Eilers Music House, (C. C. A.) 270 Fed. 915 (917), *certiorari* denied, 257 U. S. 613, 646."

In Head vs. Brainard, the court cites the recent case of Taubel vs. Fox, 264 U. S. 426, and states:

> "The court (the Supreme Court of the United States) held that under the Act of 1898 the bankruptcy court had power to adjudicate, without consent, con-

troversies, concerning the title arising under either sections 67e, 60b or 70e (Comp. St. 9651, 9644, 9654), where the property was in possession of the court, but that while possession was essential to jurisdiction, it need not be actual, but was sufficient if constructive, and in giving several instances wherein the court might exercise jurisdiction, Justice BRANDEIS includes those 'where the property is held by one who makes the claim, but the claim is colorable only.' The court also held that as the bankruptcy court must have power to determine whether it has possession, actual or constructive, 'it may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court'."

Citing:

Myers vs. International Trust Co., 263 U. S. 64.

This doctrine is supported also by very many cases in the various District and Circuit Courts of Appeal of the United States:

In re Looschen Piano Co., 261 Fed. 93 (N. J.), second syllabus:

"Where a trustee in bankruptcy applies for an order requiring third parties to turn over property in their possession, and bases his application upon the ground that the property in question belongs to the bankrupt and is held without color of right, the referee is bound to take jurisdiction of the matter, and under that power to summarily determine the question, for the bankruptcy court is clothed with power to cause the bankrupt's estate to be collected and to determine controversies in relation thereto, and unless the claim of the trustees seems of doubtful validity, a plenary suit need not be required."

Gray vs. Gudger, (C. C. A., 5th Cir.) 260 Fed. 931:

"Where the bankruptcy court ordered sold an unscheduled life estate, title to which stood in the name of the bankrupt, and it was claimed by a son of the bankrupt, who asserted that the bankrupt had sold it to him, *held*, that the bankruptcy court has jurisdiction to summarily determine the controversy between the purchasers and the son."

Kaigler vs. Gibson, (Ga.) 264 Fed. 240:

"Where the trustee asserts two claims, one of which is cognizable by a bankruptcy court and one of which is not, the bankruptcy court may make a preliminary inquiry into the merits of the case to see if it has jurisdiction to act summarily."

In re Rockford Produce & Sales Co., (C. C. A., 7th Cir., 1921) 275 Fed. 811:

"Under amendment of June 25th, 1915, the Fedtion by a trustee in bankruptcy charging payments by eral Court had jurisdiction to try the issues on a petithe bankrupt constituted preference, and requesting an order requiring creditor to show cause why money should not be turned over to the trustee."

In re Ellis Bros. Printing Co., (N. Y.) 156 Fed. 430:

"The mere assertion of a claim of title to property adverse to a trustee in bankruptcy, even with an intention to protect it by the usual process of law, will not preclude the bankruptcy court from exercising its power to proceed summarily; but it is only when the evidence indicates that the asserted claim is not false or fraudulent that such court is deprived of jurisdiction. If it should appear from the proof that the respondent Strong refuses to surrender the money collected by him to the trustee simply on the ground that the title to the

same is conclusively evidenced by his possession of it, or *if the claim is unreal or colorable then it is the duty of the court to direct the payment to the trustee.*" (Italics ours.)

In re Holbrook Shoe & Leather Co., 165 Fed. 973:

"Where a bankrupt's trustee filed a petition for a summary order directing a corporation deemed to be a mere agent of the bankrupt to surrender possession of property which the trustee claimed belonged to the bankrupt, but which the corporation *claimed in its own right, it was the duty of the referee to hear the testimony in order to determine whether the corporation's claim was real or merely colorable.* (Italics ours.) And if the referee finds that the claim is colorable only and without any *actual merit,* or legal foundation, he should order it surrendered to the trustee."

Levinson vs. Green, 296 Fed. 598 (9 C. C. A.):

"The power that may be exercised (the summary jurisdiction) by the ancillary court to take possession of property rests on the interest in the property of the person or estate in whose right the proceeding is carried on, and it follows that what this interest may be cannot be ascertained without determining *conflicting* interests that may be claimed by *others* in the property."

In re Friedman, et al., (C. C. A., 2nd Cir.) 161 Fed. 260:

"The referee has power in summary proceedings to order third persons claiming the property in their own right to turn it over to the trustee."

In re Norris, (N. Y.) 177 Fed. 598:

"The bankruptcy court has power to ascertain whether an adverse claim to the property of the bank-

rupt made by a third person, *in possession is in fact* well founded or is fictitious or colorable."

In re Franklin Suit & Shirt Co., (Pa.) 197 Fed. 591:

"A court of bankruptcy may determine an adverse claim summarily even before adjudication, and if the holder is without any real claim of ownership in himself to order it turned over forthwith."

In re Iron Clad Mfg. Co., (N. Y.) 194 Fed. 906:

"*If the fraud is indisputable on the record*, the bankruptcy court may summarily order the property turned over. Facts in this case held to show such lack of good faith and colorability as to justify a summary order."

In re Resnek Shapiro & Co., 246 Fed. 879:

"Where a claim of a third person is founded on patent and flagrant fraud, the bankruptcy court may order property turned over to trustee."

In re Eilers Music House, (9th Cir., C. C. A.) 270 Fed. 915, adopting the report of the special master, which said:

"The challenge to the jurisdiction of this court to dispose of the controversy in a summary proceeding is overcome by the conclusion that these assets are a part of the general estate of the music house and merely held by the Oregon Eilers as an agent or branch thereof. The jurisdiction of this court is not ousted by the circumstances that an adverse claim has been set up. Before there is an ouster the claim must have such foundation *in law and in fact* as to make it appear to the court *highly probable that it exists, can be maintained and is asserted in good faith.* (Remington on Bankruptcy, 1654½; Sweer vs. Brown, 130 Fed. 328,

64 C. C. A. 574; *In re* Holbrook Shoe & Leather Co., 165 Fed. 973.)"

In re Uttenbogard, 295 Fed. 778 (781) (8th C. C. A.):

> "The District Court should have first passed on the jurisdiction of the referee to proceed summarily in order to determine whether there is reasonable ground to sustain the bank's claim that it is entitled to retain the money in controversy, *and that the adverse claim is made in good faith.*"

This court has recently said, in the case of May vs. Henderson, No. 126, October term, 1924, that courts of bankruptcy will not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim, and that the court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of that decision.

What then is the limit of the inquiry of a court sitting in bankruptcy to determine whether a summary application is or is not the proper remedy by which to restore to a trustee property which he claims to be an asset of the bankrupt estate?

The object of the summary jurisdiction of the bankruptcy court is to collect assets of the bankrupt estate. It is obvious that if a third person takes something from the bankrupt and that thing taken can be located, the bankruptcy court must have power and must be charged with the duty of determining in the first instance whether the claim by the person in possession is of such a nature that the trustee should recover possession of the asset through the bankruptcy court, or should be obligated to file a suit in another tribunal.

It is probable that much of the confusion in the law has arisen from the fact that the summary jurisdiction has been invoked to secure a personal judgment against an adverse claimant. Obviously, the only order that should be entered as the result of a summary proceeding would be for the claimant to deliver to the trustee a specific thing.

In the present case, the specific thing is money, converted first into real estate; then into mortgages, and finally into currency. The money was taken from the company by Agnes Leftwich (Gessel). There is no controversy about the fact that it was turned over to the respondent. There is no controversy about the fact that the respondent still has the money in her possession, and that now, instead of being in the form of a cashier's check, or a bank credit, or land or a mortgage, it is in the form of currency of the United States. Even if it were now in the form of real estate, it would be subject to the summary jurisdiction.

In *In re* Logan, 196 Fed. 678, the referee found that the real estate in question was in the name of a third party who was not a party to the bankruptcy case; that this party held the legal title to real estate which had formerly stood in the name of the bankrupt. It was further held in that case that the referee had jurisdiction to make the necessary findings, and there being evidence to sustain the same, had authority *to make an order requiring the respondents to convey the property, both real and personal, to the trustee and to surrender possession to him.*

Upon the point as to whether or not the property, being real estate, came within the summary jurisdiction, the court said:

"Can a referee in bankruptcy make an order in effect declaring a deed of real estate made and delivered more than four months prior to the filing of a petition in bankruptcy by a party other than a bankrupt to a person other than the bankrupt fradulent and void, and directing the person holding the title under such deed for the bankrupt to transfer such real estate by deed to the trustee? *More is to be done so far as the real estate is in question than to deliver possession. A deed must be executed and delivered. The property has not come into the physical possession of the court or trustee. Both court and trustee are confronted by Grace Tompkins, not a party to the bankruptcy proceedings except as brought in as a party to the summary proceedings by the above-mentioned order to show cause, who asserts title, and, as to the real estate, presents her recorded deed thereof and shows that after the giving of the deed she was at times living on the farm with Logan and wife,* and that as to the personal property she mortgaged the farm, and with the proceeds of the mortgage purchased same. I may assume that if no objection had been made to determining the questions as to the personal property in this summary way, the referee would have had power to make the order he did make as to it. *But has the referee any power to direct a third party to convey real estate held under a recorded deed, even if the facts proved show clearly that such third person holds as a mere trustee or agent for the bankrupt?*

"It has been decided that the referee in case of personal property may and must determine whether the claim of a third person who claims to be an adverse claimant is real or fictitious, merely colorable (Mueller vs. Nugent, 184 U. S. 1, 15, 22 Sup. Ct. 269, 46 L. ed. 405). An assignee for the benefit of creditors is but the agent, at best, of the bankrupt who made the assignment (Bryan vs. Bernheimer, 181 U. S. 188, 21

Sup. Ct. 557, 45 L. ed. 814). *In short, a third person having possession of personal property which in fact clearly belongs to the bankrupt is not an adverse claimant for the reason he says he is.* But if such third person has a bill of sale of such personal property, describing it, which he took from a person other than the bankrupt who, in fact, owned the property, and the claim of the trustee in bankruptcy is that such third party took such bill of sale by collusion with the bankrupt more than four months before bankruptcy, the filing of a petition, and to cheat and defraud creditors, and this is denied by such third person, who also claims that he is in possession and there is a real question as to who has possession, may the whole matter be tried before the referee and determined by him? Put deed in place of bill of sale and real estate in place of personal property and may the referee hear and determine the whole question and make a valid and binding order for the conveyance of the property to the trustee?"

The court in the opinion then discussed the circumstances under which title to the land in the Logan case was taken by the third party, and after referring to the fact that the referee found that the claim of such third party was merely colorable, proceeded to say:

"Accepting these findings which the referee had jurisdiction to make, and which it was his duty to make, if the evidence warranted them, and Grace Tompkins was not an adverse claimant at and before the filing of the petition in bankruptcy. * * *

"In Louisville Trust Co. vs. Comingor, 184 U. S. 18-25, 22 Sup. Ct. 293, 296 (46 L. ed. 413), the court said: 'We have just held in Mueller vs. Nugent, *ante* 1, that the District Court has power to ascertain whether in the particular instance the claim asserted

is an adverse claim existing at the time the petition was filed. And, according to the conclusion reached, the court will retain jurisdiction or decline to adjudicate the merits.' * * *

"In Mueller vs. Nugent, 184 U. S. 1, 14, 22 Sup. Ct. 269, 275 (46 L. ed. 405), the court held that: 'The bankruptcy court has power to compel the surrender of money or other assets of the bankrupt in his possession, or that of some one for him, on petition and rule to show cause.'

"Also, 'The refusal to surrender property of the bankrupt does not in itself create an adverse claim at the time the petition is filed'."

The referee in this present case has found that the claim was not made in good faith, but was made in flagrant fraud, and that there was no basis for the claim.

If it be within the judicial power of the bankruptcy court to determine the good faith of the person asserting the claim, upon what shall the court act? Upon the facts or upon the form of a claim? If the Court may not determine the facts, it is submitted that the summary jurisdiction could be sustained only when the adverse claimant would admit the wrong; which places the power of determining the matter, not in the court, but in the wrong-doer.

The bankruptcy court is a real judicial tribunal exercising equity powers; it is not an administrative bureau. So it must have power to determine the fact upon which its jurisdiction depends.

It is believed that the decisions cited above cannot be reconciled with the opinion of the Circuit Court in the present case, that:

> "In our judgment the meaning of that word (colorable) as used in that connection is that a claim alleged to be adverse is only colorably so when, admitting the facts to be as alleged by the claimant there is, as a matter of law, no adverseness in the claim." (R. 225.)

And

> "However improbable or even fraudulent this claim may be, yet that matter has no bearing upon determination of jurisdiction, but is pertinent only on the merits in the court properly having jurisdiction of the controversy." (R. 225.)

We believe the sound doctrine is that if the claim is made in bad faith and founded in fraud, it is colorable within the meaning of the law.

In the present case, the lower court found every fact necessary to sustain the summary jurisdiction (R. 13, 14, 15):

That the claim set up is colorable and fraudulent and not real;

That the fund is held for the bankrupt;

That the title has never passed from the bankrupt;

That the fund is an asset of the bankrupt estate.

This case presents squarely for determination the question:

> **Is the summary jurisdiction of the bankruptcy court to be determined by the facts as found by the court, or solely by the admission of the claimant?**

The decision of the Circuit Court of Appeals (R. 225) turns upon the fact that there was testimony "That a Mrs. Gessel, who was a stockholder in a corporation, which was

the immediate predecessor of the bankrupt, was given money from the assets of that company, with the permission of the only other stockholder with herself in that company, at a time when such company was entirely solvent; that the sums taken might have been declared as dividends; that this money was given to her mother in payment of indebtedness due from Mrs. Gessel."

The court then says:

> "However improbable or even fraudulent this claim may be, yet that matter has no bearing upon determination of jurisdiction. * * * " (R. 226)

This statement, we believe, marks the extreme limit toward which the courts have gone in denying the summary jurisdiction. And if this is the law, there is in practice no power in the bankruptcy court to restore an asset, even if embezzled or stolen, if it is in the possession of a third person asserting title; for if property is stolen or money embezzled it is taken necessarily with the idea of keeping it.

The decision of the Circuit Court of Appeals in this case means, when analyzed, that the summary jurisdiction can be invoked only when the holder asserts no title at all. If this be the law, then the language of this court, in May vs. Henderson, when it said that it will not permit the summary jurisdiction to be ousted by the mere assertion of a claim, is hard to understand, and the language of this court in Miller vs. Nugent, 184 U. S. 1,

> "but suppose that respondent had asserted that she had the right of possession by reason of a claim adverse to the bankrupt, the bankruptcy court has the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition,"

must be changed to read:

> "the bankruptcy court has the power only to ascertain whether any claim, valid upon its face, is made by the respondent."

The power of the court, as defined in that decision, was to ascertain whether any basis for a claim existed in fact, or, in the words of the court "actually existed."

The power of the court is not to determine if there were a claim, for that is pre-supposed; but upon what the claim was founded.

Surely this court did not use that language without consideration. To examine into the basis of a claim is the exercise of judicial power; and when analyzed that is the essence of judicial power. The statement of the law, as laid down by Judge STONE in this case, is that the bankruptcy court has only the power to examine if a claim is asserted. The power to ascertain whether the claim has any foundation in fact, or as this court stated in Miller vs. Nugent, "to ascertain whether any basis for such a claim actually existed" would have to be exercised by some tribunal other than the bankruptcy court. An examination of Miller vs. Nugent shows that this court, in the plainest words of which the English language is capable, decided that the bankruptcy court is a court exercising judicial power; that that judicial power extends to the determination of the existence or non-existence of the foundation upon which the claim is made. If the claim has a real foundation in fact, then it must be determined in another tribunal. If there was no foundation for the claim, that is if it is fictitious, or fraudulent, then the bankruptcy court can say there is no real basis for the claim, and may proceed to issue its order upon the application of the trustee and compel the restoration of the asset to the bankrupt estate.

Surely, a court cannot be so confiding as to believe that one attempting to make away with assets of a bankrupt estate will admit that fact. Therefore, if the summary jurisdiction is to be a valid power, the decision of the Circuit Court of Appeals in this case that the summary jurisdiction may be invoked only if upon the admission of the adverse claimant the claim is merely colorable, cannot stand.

In the last analysis, what this court is to decide in this case is: Does the fact that a person, in possession of property alleged to be an asset of the bankrupt estate, asserts title and is willing to swear to ownership, divest the bankruptcy court of its power to order a return of the asset?

III.

The Appeal Should Have Been Dismissed.

The Circuit Court of Appeals in this case held that the petition to revise should be dismissed and the appeal allowed, because a matter of fact was involved. However, the entire opinion of the Court of Appeals turns upon the fact that the court was without jurisdiction because of the assertion of title by the respondent. The court did not attempt to disturb the findings of fact made by the referee and the District Court. The proper method of review, therefore, is by petition to revise.

> "Summary proceedings are proceedings and not controversies, and are reviewable by petition to revise."
>
> —Remington, 3rd ed., 3765-3766;
>
> Orinoco Iron Co. vs. Metzel, (6 C. C. A.) 230 Fed. 40.

Free vs. Shapiro, 5 Fed. (2) 578 (4th C. C. A.):

> "On a petition to superintend and revise, a District Court's findings of fact are conclusive in this court when there is substantial conflict in the testimony. In such a case we can only reverse if there is error in the application of the law to the facts."

The entire cause of the respondent is that the court was without jurisdiction to entertain the summary order. But as there was evidence to support the District Court's action the appeal should have been dismissed; for the only way it could be reviewed was by the petition to revise. The action of the court in dismissing the petition to revise has not been appealed from, but its action in allowing the appeal is before the court; and this court should direct the Circuit Court of Appeals to dismiss the appeal.

IV.

If it were admitted that every fact were as claimed by respondent, still the order was properly made.

This court held, in

Stellwagon vs. Clum, 245 U. S. 605,

that a trustee in bankruptcy, in collecting the assets of a bankrupt, is given the benefit of the state law as to ownership, though this may lead to different results in the various states.

The Bankruptcy Act of 1908, as amended, expressly gives to the trustee the status of a judgment creditor (Amendment 1910, Sec. 47A (2).

See Remington, (3rd ed.) Sec. 1507.

So, though every claim of the respondent were true, under the Oklahoma law, no title to the money ever passed from the corporation.

The law in Oklahoma is that a diversion of funds by an officer of a corporation, without a corporate act, does not pass the title of the fund so diverted from the corporation, and that a judgment creditor may levy an execution upon such property when found in the hands of a third person, whether such creditor was so at the time of the diversion of the funds or became so subsequently. The question is fully discussed by the Supreme Court of Oklahoma, in

Indian Land & Trust Company vs. Robert L. Owen, 63 Okl. 127.

Even in the absence of fraud, the delivery by an officer to another of an asset of a corporation does not pass title. Of course, if the specific asset were not located and a general suit for accounting were necessary, this could not be the subject of the summary jurisdiction. But the $10,000.00 in currency in the possession of the respondent is the same asset which was taken.

If this is the property of the corporation, a judgment creditor in Oklahoma could levy an execution on it in the hands of the respondent.

The trustee is, by the express provision of the bankruptcy act, vested with the title of all property of the bankrupt upon which a judgment creditor might levy an execution. See 70a (5).

—*In re* Garcewith, 115 Fed. 87 (C. C. A., 4th Cir.).

So, without going into the question of embezzlement or fraud as an element of jurisdiction, and admitting for the purpose of this statement that an officer of the corporation took a specific fund from the corporate treasury without corporate authority and delivered it to another, under the law in Oklahoma the title never passed, and if the specific fund can be located a judgment creditor of a corporation may levy an execution upon that fund. And a trustee in bankruptcy, having the status of a judgment creditor, may recover it in a summary proceeding, for the basis of the right is that it is a specifically located asset, title to which is in the bankrupt.

We do not believe that in the administration of the bankruptcy law, the trustee, having established that the claim of one asserting a right is patently and flagrantly fraudulent, colorable and fictitious, should be deprived of the summary remedy which the bankruptcy act has provided.

V.

The respondent has been heard fully as though in a plenary equity suit though in form a summary proceeding.

An examination of this case discloses that in the final analysis the only objection is as to the form of the proceeding. This court has held, in Miller vs. Nugent, 184 U. S. 1, that the bankruptcy court, through the referee in bankruptcy, exercises equitable jurisdiction of the court.

In this case the respondent has been fully heard. The petition was fully answered and the issues joined by reply. The respondent introduced all the evidence she desired,

and if the size of the record be any criterion of the fullness of the hearing, she has been fully heard as in the most plenary proceeding of a court of chancery.

Where there has been a full hearing of the case upon the merits the court will treat the proceeding as a plenary action, giving to it the effect of a suit in chancery.

—*In re* Eilers Music House, 270 Fed. 915.

In this case, if the trustee had filed a bill for an accounting and to impress the trust, the same evidence could have been introduced, and the same result arrived at. No substantial right has been denied the defendant at any stage of the case. The only right she claimed, which has been denied, was the right to have the trustee file a bill in chancery and proceed in another forum.

While these proceedings are called summary, they have certainly nothing of an arbitrary character. The examination proceeded for a month. The cases were briefed and argued in an almost interminable manner. In fact the respondent's claim could not have been heard more fully without an imposition on the court.

The findings of the referee show a careful and exhaustive consideration of the evidence and d i s c l o s e that he did not act in a summary or arbitrary manner, but considered and weighed every claim that has been made by the defendant, either through her response or by her testimony on the stand.

It is submitted that the decree of the Circuit Court of Appeals should be set aside, and the order of the District Court for the Eastern District of Oklahoma affirmed, and that the respondent should be ordered to deliver this fund to the trustee in bankruptcy.

PHILIP KATES,
Attorney for the Petitioner.

A. C. Mitchell